

NATIONAL WILDLIFE FEDERATION ET AL.

IBLA 85-482

Decided June 25, 1985

Appeal from denial by the Montana State Office, Bureau of Land Management, of protests to private land exchange M 58537.

Affirmed.

1. Exchanges of Land: Generally -- Federal Land Policy and Management Act of 1976: Exchanges -- Private Exchanges: Protests

Where the record in a private exchange case reflects that BLM considered the wildlife values of the public lands subject to exchange and determined them to be not significant, a claim that such lands are of critical importance to wildlife cannot be sustained where there is a failure to provide persuasive evidence that BLM's analysis of the wildlife values is improper.

2. Exchanges of Land: Generally -- Federal Land Policy and Management Act of 1976: Exchanges -- Private Exchanges: Protests -- Private Exchanges: Public Interest

The denial of a protest to a private land exchange will be upheld where BLM determines that the public interest is well served by proceeding with the exchange and the protestant fails to show BLM erred in that determination.

3. Exchanges of Land: Generally -- Federal Land Policy and Management Act of 1976: Exchanges -- Private Exchanges: Protests

Where the Environmental Assessment/Land Report of a private land exchange reflects that BLM considered the alternative of imposing a conservation easement or land use covenant to protect wildlife values on the public land subject to exchange, but BLM's analysis results in the conclusion that such a restriction is not warranted, such a determination will not be overturned in the absence of a showing of error.

APPEARANCES: Thomas France, Esq., Missoula, Montana, for the National Wildlife Federation and the Montana Wildlife Federation; Stan Bradshaw, Esq., Helena, Montana, for the Montana Department of Fish, Wildlife and Parks; Richard K. Aldrich, Esq., Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

This is the second time an appeal relating to private land exchange M 58537 has been brought before this Board. National Wildlife Federation (NWF) filed the first appeal following the denial by the Montana State Director, Bureau of Land Management (BLM), of its protest to the exchange, and it resulted in our decision styled National Wildlife Federation, 82 IBLA 303 (1984). Therein, we vacated the State Director's decision and remanded the case to BLM to expand its Environmental Analysis (EA) to address the concerns raised by NWF relating to sod busting and wildlife protection. We directed that if BLM determined to proceed with the exchange, it should proceed in accordance with 43 CFR Part 2200.

On remand BLM reviewed the case and determined to modify the proposed exchange so that only 1,160.59 acres of public land would be exchanged for 241.1 acres of private land, and there would be no equalization payment. ^{1/}

BLM published a new Notice of Realty Action (NORA) in the Federal Register on December 19, 1984, allowing a 45-day comment period. NWF, the Montana Wildlife Federation (MWF), and the Montana Department of Fish, Wildlife and Parks (MDFWP) filed objections to the proposed exchange. The State Director addressed the objections in letters dated February 21, 1985, in which he stated that BLM intended to proceed with the exchange as proposed. NWF, MWF, and MDFWP filed a timely appeal.

Appellants raise a number of arguments on appeal generally charging that BLM's proposed exchange violates both the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1982), and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1982). Specifically, appellants claim the Fergus Management Framework Plan (MFP) fails to identify specific tracts of land suitable for disposal by exchange and that such failure violates the public participation requirements of FLPMA. Appellants also argue BLM failed to provide the State of Montana with a meaningful role in the decisionmaking process; the decision to proceed violates the State Director's own guidelines for disposal or retention of land; and the decision violates the FLPMA requirement that exchanges be in the public interest.

Appellants further complain that the EA/Land Report prepared for the NORA is inadequate and prejudicial principally because, they argue, it does not consider adequately or accurately the conservation easement alternative, as required by NEPA. Appellants consider this failure as exhibiting a lack of good faith on the part of BLM in its evaluation of the easement alternative.

^{1/} As described in National Wildlife Federation, 82 IBLA at 304-05, the proposal had involved exchanging 1,430.59 acres of public land for 241.1 acres of private land with a cash equalization payment of \$ 45,000. The present amount of the public land involved in the exchange was all part of the original proposal.

Finally, appellants charge that BLM failed to consider other reasonable alternatives.

On May 20, 1985, counsel for BLM filed a detailed response addressing with particularity each argument raised by appellants and requesting the Board to expedite its review of the appeal because any further delay might jeopardize consummation of the exchange. The request to expedite the appeal is granted.

[1] The first argument raised by appellants, that the Fergus MFP fails to identify specific tracts suitable for disposal as required by sections 102(a) and 203(c) of FLPMA, 43 U.S.C. §§ 1701(a) and 1713(c) (1982), was addressed by the Board in our earlier decision at 82 IBLA 308-09. While appellants acknowledge that the Board previously rejected the same argument, they state "subsequent disclosures" indicate that BLM ignored the critical importance of the public lands proposed for exchange (Statement of Reasons (SOR) at 11). The only disclosure cited by appellants is a January 18, 1983, memorandum to the "DeMars/Bold Land Exchange File" from the Judith Resource Area Biologist 2/ (SOR, Exh. 15). That memorandum reads in pertinent part:

The Butcher sage grouse strutting ground located in Section 36 NW was inventoried at 80 males in 1982. This is the largest breeding ground west of Highway 191 in Fergus County. The annual population varies from 700 to 1,400. Winter areas identified on public lands are those in Sections 35, 31 and 6 which are also lands involved in the proposed exchange. State section 36 is winter range. Those adjacent private lands which have not been farmed due to topography are marginal to nonhabitat. The attached map shows lands plowed within two miles of the breeding ground. Grounds colored green have not been active since the early 70's, probably a result of lost habitat. Grounds colored red are still active and the only remaining significant grounds in the Winifred area. With the exception of two grounds, all of the remaining grounds are on public lands or state lands.

* * * * * * *

If viable sage grouse and antelope populations are to continue to exist in the Fergus Planning Unit west of Highway 191, public and state lands must be maintained in their native condition. The land management trend on private lands is to farm all potential lands, and there is no indication that this management practice will change. The most important sage grouse habitats are farmable.

2/ The memorandum is identified in appellants' SOR at page 11 as being dated Jan. 18, 1985, which would make it "subsequent" to our September 1984 decision; however, the actual date on the memorandum is Jan. 18, 1983. Appellants' reference to "subsequent disclosure" may, however, relate to the fact that the memorandum was not included as part of the case file in the previous appeal.

Appellants allege this memorandum establishes the critical nature for wildlife of the lands proposed for exchange and that neither the EA nor the Fergus MFP acknowledges this importance.

Counsel for BLM argues that this memorandum constitutes "one of the earliest assessments in the preliminary stages of determining whether or not BLM should pursue the exchange proposal" (Answer at 2). Subsequent analysis conducted in preparing the EA, using data published by the predecessor of MDFWP, counsel asserts, showed the preliminary assessment to be a significant overstatement of the importance of the public lands proposed for exchange. ^{3/} Moreover, appellants quote the memorandum out of context, counsel argues, by stating at page 11 of their SOR that, "The report went on to find that the public lands involved must be maintained in their native condition 'if viable populations of sage grouse and antelope are to continue to exist in the Fergus Planning Unit.'" (Emphasis in original). Counsel points out that in the memorandum this statement referred to state and public land west of Highway 91, an area of several hundred thousand acres.

We find no failure to comply with FLPMA land use planning sections. Appellants have failed to establish that BLM erred in its analysis of the wildlife values of the public lands proposed for exchange. BLM has explained that the January 18, 1983, memorandum was a preliminary report which contained statements more broadly applicable than to the specific public lands now involved in the proposed exchange, and that further analysis disclosed different results.

^{3/} The wildlife populations on the public lands subject to exchange are described in the EA at page 6 as follows:

"It is estimated that the annual sage grouse population in the area, of which the public lands are a part, varies from 1,400 after brood hatch down to 700 by fall. This is based on a ratio of two females for each male using the only known active breeding ground in the area in the NE 1/4, Section 35, T. 21 N., R. 19 E. This breeding ground which is on private land was inventoried at 80 males in 1972, 72 males in 1983, and 67 males in 1984.

"No breeding grounds occur on the public lands concerned although tracts B and C [the selected Federal lands are identified as tracts A, B, and C] lie within a two-mile radius of the breeding ground in Section 35 and provide approximately 39% (960 acres) of the suitable nesting and winter habitat for this population. The remaining 61% (1,490 acres) is found on private (35% or 850 acres), and state (26% or 640 acres) lands. Studies in the Yellow Water Triangle of central Montana have shown that most activities of sage grouse occur within a two-mile radius of the breeding ground although some are known to travel over a greater distance (Life History and Habitat Requirements of Sage Grouse in Central Montana by Ritchard Wallestad, Montana Department of Fish and Game, 1975).

"Antelope populations in the area are normal at 3.3 per section. Sage-brush habitat on the public lands concerned does provide a portion of the herd's winter range." We note the EA identifies the NE 1/4, sec. 35, T. 21 N., R. 19 E., which is private land, as the "only active breeding ground in the area," while the Jan. 18, 1983, memorandum describes "Section 36 NW", which is state land, as the "largest breeding ground west of Highway 191 in Fergus County."

Appellants next argue that by failing to specifically identify tracts suitable for disposal in the Fergus MFP, BLM violated the public participation requirements of FLPMA. The relevant provision, section 202(a) of FLPMA, 43 U.S.C. § 1712(a) (1982), provides that "[t]he Secretary shall, with public involvement * * * develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands."

The same argument was presented in the previous appeal, to which we responded:

Clearly, an ideal situation would be that every isolated tract of public land would be inventoried and identified as to its relative merits for exchange purposes prior to receipt of any exchange proposal. The fact that this was not done did not deprive NWF from meaningful participation in this particular exchange. NWF was allowed the opportunity to submit comments concerning this exchange. Likewise, NWF's argument that the public participation requirement of FLPMA was not met because the public was not given the opportunity to comment on a site specific EA at the MFP stage or in the early stages of this exchange proposal must fail for the reasons stated above.

82 IBLA at 309-10. Appellants claim the FLPMA mandate is clear; BLM must develop land use plans "by tracts or areas." Appellants believe the Board erred in failing to recognize this in its earlier decision. In our earlier decision we construed the argument as being directed specifically to the exchange in question and found that NWF had not been denied meaningful participation in this exchange.

Appellants cannot be heard to complain in this appeal about some generalized lack of specificity in the Fergus MFP. That BLM solicited a wide range of public participation in development of the Fergus MFP cannot be denied (Answer, Exh. 1). Further, in June 1984 BLM issued a document entitled "Land Pattern Review and Land Adjustment Supplement to State Director Guidance for Resource Management Planning in Montana and the Dakotas" which identified lands for retention and lands available for disposal (Answer, Exh. 2). Counsel for BLM asserts that the public lands involved in the present exchange all are located in the latter category. Furthermore, counsel states that drafts of the document were subject to a wide range of public participation (Answer, Exh. 3). Appellants have established no violation of section 202(a) of FLPMA.

Appellants next contend BLM failed to provide the State of Montana with a meaningful role in the decisionmaking process concerning the present exchange, in violation of section 202(c) of FLPMA, 43 U.S.C. § 1712(c) (1982). During BLM's initial assessment of the public lands subject to this exchange, appellants argue, MDFWP was not contacted. BLM responded stating that prior to mid-1983 its contacts with MDFWP were of an informal nature on the local level. BLM provides the notarized statement of the Judith Resource Area Biologist, Doug Ayers, who outlined his general procedure for preparing land reports, which involved contacts with Bob Watts of MDFWP. Ayers stated that he contacted Watts prior to submitting his report for the present exchange

(Answer, Exh. 5). Thus, contrary to appellants' assertion, it appears there was contact, albeit informal and at the local level.

While BLM has provided evidence that formalized procedures have now been developed for involving all levels of state government in the land adjustment process (Answer, Exh. 6), the question is whether there was meaningful public involvement by the State in this particular exchange. The record as a whole reveals that there was. As recounted by counsel for BLM, the file contains numerous letters from either the Governor's office or MDFWP stating their position on the exchange or providing other information. BLM responded to these letters. In addition, the record shows that BLM officials met with State officials on a number of occasions to discuss the exchange. The fact that BLM did not accept all the suggestions or comments by the State does not mean the State was denied meaningful involvement. Appellants' argument must be rejected.

We turn to another argument made in the previous appeal -- that the proposed exchange violates the State Director's guidelines concerning retention and disposal of lands. In our earlier decision we found no merit to this argument. 82 IBLA at 311-12. In that appeal NWF made its argument based on a document entitled "State Director Guidance for Resource Management Planning in Montana and the Dakotas," dated April 13, 1983, which provided criteria for categorizing lands for retention, disposal, or further study. Appellants' argument in this case is based on the same document. Appellants have ignored, however, the supplement to that document, "Land Pattern Review and Land Adjustment, Supplement to State Director Guidance for Resource Management," dated June 1984 (Answer, Exh. 2). ^{4/} BLM has submitted evidence that both NWF and the State reviewed and provided comments on the draft of this supplemental document (Answer, Exhs. 7 and 8).

Appellants again complain as part of their argument relating to the guidelines that BLM failed to identify the public lands involved in the exchange as having significant wildlife values. Their basis for this claim is the previously discussed January 18, 1983, memorandum prepared by the Judith Area Resource Biologist (SOR, Exh. 15). Appellants would have us believe that BLM is bound for all times by the observations expressed in that memorandum. However, counsel for BLM has pointed out subsequent analysis of the underlying data disclosed that the memorandum had overstated the significance of the wildlife on the public lands. We find no failure to adhere to guidelines as alleged by appellants.

[2] A further argument offered by appellants is that BLM's decision to proceed with the exchange violates the requirement of section 206(a)(1) of FLPMA, 43 U.S.C. § 1716(a)(1) (1982), that exchanges be in the public interest.

^{4/} This document is referred to in the EA at page 3 as follows:

"c. State Director Guidance/Land Pattern Review & Land Adjustment

Per State Director guidance on Land Pattern Review & Land Adjustment, retention areas were delineated for the Judith Resource Area. Relative to this, the private land identified in this proposal is located in a retention area and the public land lies outside the retention area."

As support for this claim appellants state "[t]his is particularly evidenced by the resistance to the exchange shown by local organizations such NWF/MWF, the MDFWP, and by the Governor of the State of Montana" (SOR at 20). Counsel for BLM observes that NWF, MWF and MDFWP are single-use, wildlife-oriented organizations, and that the Governor's objections reflect the wildlife concerns of MDFWP. Counsel for BLM argues that BLM is mandated to consider not only wildlife interests, but a multitude of other interests in determining whether an exchange is in the public interest (Answer at 15). On appeal BLM provides a matrix developed utilizing values described in the EA/Land Report which set forth the resource values on the public and private lands (Answer, Exh. 9). The conclusion to be drawn from that analysis, counsel for BLM asserts, is that the exchange is overwhelmingly in the public interest. Moreover, despite appellants' claim that the exchange is not in the public interest, counsel provides copies of letters from the Fergus County Conservation District and the Montana Public Lands Council evidencing support for the exchange (Answer, Exhs. 10 and 11).

Appellants still assert that BLM has maintained its position despite conflicting information given by MDFWP on wildlife values and that the potential for wildlife losses "clearly evidences a callous disregard of significant public values" (SOR at 21). Counsel for BLM claims appellants have challenged BLM's information used in its analysis of the values of the public and private lands, without demonstrating why BLM's information is wrong.

We find appellants have failed to establish that the exchange in question is not in the public interest. 5/ In fact, in a March 10, 1984, letter from NWF's Regional Director to BLM, concerning this exchange, the Regional Director stated, "We believe this acquisition would be very much in the public interest."

Appellants next turn their arguments to NEPA considerations, charging that the EA/Land Report of November 26, 1984, prepared for the NORA is inadequate and prejudicial.

5/ In the EA at page 18 BLM concludes the exchange is in the public interest for the following reasons:

"A. The actual and potential values on the private land overwhelmingly exceed the loss of values on the public land.

"B. Acquires a tract of land within the Missouri River corridor that has excellent recreation potential for fishing, boating, camping and hunting.

"C. Acquires the well preserved structures of the historic August Nelson Homestead which has excellent interpretive potential.

"D. Acquires road access to the Missouri Wild and Scenic River and to a large contiguous block of public land.

"E. Acquires riparian habitat with a population of mule deer, white-tail deer and pheasant.

"F. Supplements objectives and/or recommendations identified in the Fergus MFP, Upper Missouri Wild and Scenic River Plan and State Directors Guidance for Land Pattern Review and Land Adjustment."

In our previous decision we directed BLM on remand to prepare a revised EA and land report to address the concerns raised in the first appeal. Appellants argue that BLM failed to give "full good faith consideration of environmental values," citing Sierra Club v. Morton, 510 F.2d 813 (5th Cir. 1975).

The EA is inadequate in the first instance, appellants contend, because any potential impact on the wildlife values of the public lands are dismissed as insignificant from a region-wide perspective. In this regard appellants cite "the findings of the BLM's own wildlife specialists and the State Director's Guidelines" (SOR at 23). BLM's determination to address the significance of the impacts of the exchange on wildlife on the public lands on a region-wide basis appears reasonable under the circumstances. As discussed previously, the materials cited by appellants certainly do not prohibit such an approach. The EA at pages 12-13 adequately explains the effect of the exchange on the wildlife populations of the selected public lands. The EA at page 13 estimates the consequences if all farmable lands were plowed (Class VI and better), i.e., approximately 850 acres, the potential loss would be 4.4 antelope and approximately 350 sage grouse. Both of these figures were considered not to be measurable over a region-wide basis. ^{6/} Appellants have failed to show any error in assessment of the wildlife values of the public lands and the impact of the exchange on those values.

The EA also inaccurately reported the private lands as having high recreation and wildlife values, appellants charge. Appellants believe the private lands provide only marginal habitat for deer and pheasant and that conversion of the area from cropland to native range will eliminate the populations of both. ^{7/} This argument is unsupported by the record, and, in fact, is directly contradicted by a March 10, 1984, letter from NWF's Regional Executive to BLM. That letter states:

The Federation believes that the Bureau should make every effort to acquire the 240-acre tract in the Breaks, not only because of

^{6/} It should be emphasized that these figures in essence represent a worst-case scenario. In the EA at page 1, BLM sets forth three future land use scenarios:

"1. Robert Bold plans to reseed about 220 acres (in Tract B) to a mixture of alfalfa and grass.

"2. If it were decided to produce grain crops, a 'prudent' farmer could produce grain on about 275 acres by adhering to Soil Conservation Service standards which considers Class IV and better soils as farmable.

"3. Some Class VI lands are farmed in central Montana and if this were to occur on the three public land tracts about 850 acres could be farmed." Under the first scenario, the EA estimated 9 percent of the 2,450 acres of suitable habitat (public, private and state lands) used by the sage grouse population associated with the breeding ground in sec. 35, T. 21 N., R. 19 E., would be farmed. The impact of that disturbance would be lessened, the EA states, because the establishment of the grass/alfalfa mix would provide food for the sage grouse from May through October (EA at 12).

^{7/} According to the Nov. 26, 1984, EA at page 5, only 70 acres of private land involved in the exchange are "currently cultivated for crop production."

its high wildlife values and the fact it provides important public access to public lands but because it would form a public access and use corridor between the Missouri River and adjacent Bureau holdings. We believe that this acquisition would be very much in the public interest.

(SOR, Exh. 3).

Likewise, the EA at pages 4-5 indicates that the private lands contain good riparian vegetation which provides habitat for both deer and pheasant. The private lands also provide feeding, nesting, and loafing areas for geese and ducks (EA at 6). The EA further indicates that future management of that area is intended to improve the riparian zone (EA at 7, 10, 11).

Appellants again challenge BLM's figures on potential habitat and population losses associated with the exchange. However, while criticizing BLM's estimates as too low, and predicting much greater impacts, appellants do not provide a sufficient basis on which to evaluate their predictions. BLM, on the other hand, had demonstrated how it derived its figures. 8/ Appellants have shown no error in BLM's calculations.

Appellants offer two reasons why BLM's approach to measuring wildlife values was wrong. First, appellants criticize BLM for failing to follow the State Director Guidance for Resource Management Planning in Montana and the Dakotas, dated April 15, 1983, in determining the significance of the land. As pointed out supra, appellants rely on guidelines which have been superseded by the June 1984 supplemental document. That document was utilized and followed by BLM in its EA. See EA at 3-4 and 18.

Second, BLM has consistently, appellants contend, failed to take seriously the State interest in protecting these lands. We disagree. The record reveals that BLM has considered the State's interest. The fact that BLM's conclusion on the significance of wildlife values differed from that of the State does not mean that BLM failed to consider seriously the State's interest. 9/

[3] Our decision of September 5, 1984, directed BLM to study the possibility of proposing conditions or covenants to guarantee protection of wildlife and recreational values in the land. 82 IBLA at 315. This alternative was considered in the EA, but not adopted. Appellants believe that BLM did not attempt a good faith evaluation of the easement alternative. Appellants claim BLM "developed only one easement alternative and then rejected it based on a series of unquantified, hypothetical situations which projected the worst hardships possible from the alternative" (SOR at 27).

8/ The record shows BLM utilized published data and procedures used by MDFWP to estimate sage grouse population (Answer at 20-21; Appellants' Exh. 17).

9/ As we pointed out at 82 IBLA at 314 n. 7, neither section 210 of FLPMA, 43 U.S.C. § 1720 (1982), nor 43 CFR 2201.1(e) "contains any mandate that BLM conform its proposal to the preference of the State government."

The conservation easement alternative was described in the EA at pages 2 and 16, as follows:

The intent of this alternative would be to restrict practices that would convert existing habitats to farmland. A conservation easement administered by another agency or organization, or deed restrictions in the form of use covenants administered by BLM could meet the objectives of this alternative. Deed restrictions or the conservation easement would apply to those Class III, IV and VI lands within section 6, T. 20 N., R. 20 E., section 35, T. 21 N., R. 19 E., and section 31, T. 21 N., R. 20 E. [Approximately 850 acres]. This is the area that is considered to provide wildlife habitat as discussed in Section IV.A.4.b.

* * * * *

This alternative would place a hardship on the exchange proponent (Tom DeMars) and the potential landowner (Robert Bold) by restricting opportunities for future management of the land. The saleable value of this land would be reduced. Tom DeMars has verbally indicated that he will not consider this alternative. From an administrative standpoint, negative impacts would result. The public land would have to be appraised with a loss in value deducted. A preliminary appraisal estimate indicated that the amount would be approximately \$ 14,111. There would be compliance and monitoring work at a cost to the public, on the part of BLM or other responsible agency. In addition to this, enforceability could be a problem, and there could be costs of litigation if terms were violated.

Appellants attack the reasons given by BLM for not adopting the conservation easement. The cost of administering the easement, appellants state, would be minimal, since compliance could be verified by one yearly field trip. On the other hand, BLM maintains there would be significant administrative costs. Counsel for BLM states in his answer at page 27:

BLM maintains that there would be significant administration costs. A minimum of two general compliance checks (spring and fall) would be necessary each year, considering seeding time for various crop species. In considering the NWF easement proposal, additional compliance checks would be required relative to the permitted uses and practices; i.e., namely that for saline seep treatment. Under this type of treatment, negotiations between the administering agency and the private landowner would be required especially where differences of opinion existed. Subsequent compliance checks would be necessary throughout the spring, summer and fall. These field checks and negotiations could involve several resource specialists such as a soil scientist, range conservationist, wildlife biologist and/or realty specialist.

Appellants further complain that BLM failed to show how it evaluated the easement and why the easement would reduce the value of the public land.

Appellants state that BLM "has acknowledged that the lands being protected through the easement are Class VI soil types which are unsuitable for farming and are already appraised as rangeland" (SOR at 30). BLM's answer explains a page 28:

First of all the lands that would be covered by the easement contain Class III, IV and VI soil types. See EA at pages 2 and 5. There are approximately 114 acres suitable for development into dry farmland. With the imposition of the easement, the buyer loses the development rights. The change in highest and best use dictates a lower appraised value. The remaining acreage that would be covered by the easement is not suitable for farming. However, the easement would freeze the current use, denoting a 5% loss of value. This procedure is in accordance with Uniform Appraisal Standards. See Exhibit 20.

Appellants question why the easement would pose a hardship to the potential owner when the easement would do nothing more than give legal effect to the verbal assurances that farming would not take place. It is clear that such an easement could foreclose certain future options of the landowner; however, the question is whether the degree of hardship to the potential landowner is a proper consideration in determining whether to require such an easement. The analysis must begin with identification of the values of the land in question. Do they need protection? Is a restriction in the deed the only way to protect them? BLM's decision on whether to impose the easement cannot be dictated by the landowner. BLM must weigh the various options available and if an easement is the only method which will provide the necessary protection, BLM must impose it. 10/

In this case the record does not reflect that DeMars' opposition to an easement was the decisive factor in rejecting the easement option. As set out by the State Director in his February 21, 1985, response to the objections of NWF, "perhaps the most important consideration was whether the existing wildlife values were significant enough to warrant use restrictions. Our conclusion based on our analysis was that they were not." BLM gave good faith consideration to the conservation easement option. That appellants disagree with BLM's conclusions does not support a finding that BLM's determination to reject the easement option was erroneous or that BLM acted in bad faith.

BLM had a duty, appellants argue, to pursue other alternatives which might offer solutions to the problems presented by the easement alternative proposed and rejected in the EA. Specifically, appellants point to a proposal by MDFWP which would have provided for an easement covering 480 acres in sec. 6, T. 20 N., R. 20 E. and sec. 35, T. 21 N., R. 20 E. Appellants claim such an easement would be a "less burdensome" alternative, yet would protect what they believe to be the most critical wildlife habitats on the public land. BLM's response to this argument by appellants is that it suffers from the same deficiencies as the easement considered in the EA and that

10/ We note, however, that BLM's stated policy is that if a tract of land is found to have public benefits which would require the imposition of some type of deed restriction, such tracts would not be disposed of, except in very limited circumstances (Answer at 35, Exh. 21).

the identified problem areas are not substantially lessened by appellants' suggested alternative.

Appellants further complain that BLM gave no consideration to reduced costs and administration if the easement were managed by another agency or organization, such as MDFWP or MWF. BLM points out, however, that easement imposition would have a negative impact on the fair market value of the public lands, and as such a cash differential payment (or increased acreage) would have to be made. Appellants do not indicate what entity would bear such cost. Counsel for BLM also states that BLM has never opposed MDFWP or MWF acquiring an easement, provided they could reach an agreement with DeMars or Bold and would bear all costs (Answer at 32). 11/

The critical factor in BLM consideration of the easement option is its evaluation of the significance of the wildlife values on the public lands. While appellants believe that certain of the public lands involved in the exchange are of critical importance to wildlife, BLM concluded that the wildlife values of the selected Federal lands were not significant when evaluated on a regionwide basis. Thus, BLM's analysis shows there was not sufficient justification for a restrictive easement, whether it be the easement proposal considered in the EA or the "less burdensome" proposal of MDFWP. Appellants have not shown that BLM's analysis is incorrect.

On remand BLM prepared an expanded EA and land report which provided an analysis of the possibility of inclusion of a conservation easement, concluding that such an easement was not necessary. The record reveals how BLM arrived at this conclusion. Appellants disagree with BLM, but they have not provided evidence which would lead us to conclude that BLM acted improperly. We must affirm BLM's denial of the protests.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bruce Harris
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

R. W. Mullen
Administrative Judge.

11/ The record contains a draft copy of a conservation easement dated Jan. 30, 1985, between Bold, as grantor, and MDFWP, as grantee, for 480 acres of the public land involved in the exchange. Our ruling in this appeal does not preclude MDFWP from continuing to negotiate directly with Bold.

